October 10, 2002

SENATE COMMITTEE ON INDIAN AFFAIRS

PREPARED STATEMENT OF

BERNARD BOUSCHOR, CHAIRMAN

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

For the Hearing on

S. 2986

Bay Mills Indian Community Land Claim Settlement Act

My name is Bernard Bouschor, and I am the Chairman of the Sault Ste. Marie Tribe of Chippewa Indians (the "Sault Tribe"), a position that I have held for 17 years. The Sault Tribe opposes S. 2986. This bill purports to settle a land claim, but in reality it would enlist Congress in opening the Indian Gaming Regulatory Act to another casino scam. The Sault Tribe has a stronger claim to the land in question than Bay Mills, but we are not included in the bill. Bay Mills has already lost its claim in court and has no viable claim to settle. The bill will not clear anyone's title, as the alleged beneficiaries of the bill, the Charlotte Beach landowners, have concluded in a statement from their attorney included in the attached exhibits. The bill may well interfere with other Michigan tribes' rights under our tribal-state gaming compacts negotiated and approved

under IGRA. Finally, it is another step in the hijacking of federal Indian policy by non-Indian gaming interests, and would further distort the federal-tribal relationship in a way that tarnishes tribes to their future detriment. I would like to amplify on each of these points.

I. The Sault Tribe Has a Claim to the Charlotte Beach Lands.

The Sault Tribe has a direct and vital interest in this bill. We share the claim. We are a much larger tribe than Bay Mills. With almost 30,000 members, we are one of the largest Indian tribes in the country and by far the largest in Michigan. In fact, we have more members than all of the other eleven tribes in Michigan combined. Our territory is the eastern Upper Peninsula of Michigan, and our government is headquartered in Sault Ste. Marie, about 20 miles east of the Bay Mills Reservation.

We share a common, overlapping ancestry with Bay Mills. Because of this common ancestry, we have just as strong a claim to the Charlotte Beach lands as does Bay Mills. This is no idle assertion. That very issue was adjudicated in federal court and affirmed by the Sixth Circuit, which stated:[1]

> We are satisfied that the evidence establishes the existence of two separate tribes, both of which trace their ancestry to the two Chippewa bands headed by O-Shaw-Wan-O and Shaw-wan and both of which therefore have a potential interest in the Charlotte Beach property.

[1] Bay Mills Indian Community v. Western United Life Assurance Co., 2000 WL 282455 (6th Cir., March 28, 2000). A copy of the decision is attached as Exhibit A.

Since we share the claim with Bay Mills but did not join in their lawsuit, the federal court dismissed their case, finding that the Sault Tribe was an "indispensable party." Bay Mills could not pursue the claim to the land without us.

II. The Bill Will Not Help the Landowners.

The bill purports to incorporate a settlement agreement between the State of Michigan and Bay Mills. The agreement recites that the Governor "desires to settle the land claim for the benefit of … the affected Charlotte Beach landowners," and goes on to state that the parties believe that the settlement will "lead to a clearing of title of the Charlotte Beach lands."[2] These statements are a sham. The bill does nothing for the landowners, and both the State and Bay Mills know it.

You don't have to take the Sault Tribe's word for it. The landowners themselves have reached that conclusion. They have prepared a statement for the Committee through their attorney, which we have attached.[3] That statement captures something of what the landowners have already been through, and just how enactment of the bill will make their situation worse.

Why would the landowners oppose the bill? Because it leaves them worse off than without its passage. They know the Sault Tribe has a claim to their land, and the bill does not address that claim. Since the courts have ruled that we have whatever claim

[2] *Settlement of Land Claim*, attached as Exhibit B. Attached as Exhibit C.

[3] Prepared Statement of Leeanne Barnes Deuman, attached as Exhibit C.

Bay Mills has, and since we haven't settled that claim and have been excluded from this bill, the landowners know that their title will not be cleared. In fact, it will be even more clouded, since Congressional ratification of the claim will only strengthen our own claim. The landowners cannot get relief and clear title unless and until the Sault Tribe is included in the bill.

III. Bay Mills Has Already Lost its Claim in Court.

The Sault Tribe claim is in fact a more serious threat to the landowners than is the Bay Mills claim. Bay Mills has already lost on the merits of its claim, in a case that went all the way to the Supreme Court. This is another part of the scam: having lost its claim in court, Bay Mills seeks to enlist Congress in transmuting a lost claim into casino gold.

Bay Mills and the State have been arguing that the claim was dismissed on procedural grounds and so retains vitality. This attempts to confuse and hide the true result of the litigation. The story is somewhat complicated, since it involves two lawsuits, but the result of these cases is clearly the foreclosure of all of the Bay Mills claims.

The claim to Charlotte Beach lands stems from an 1857 deed from a non-Indian couple, Boziel Paul and his wife, to the Governor of Michigan. The deed purported to convey the land to the Governor in trust for the benefit of the two Chippewa bands mentioned in the passage quoted in the 6th Circuit opinion quoted in Section I, above. The Pauls had obtained the land by federal land patent in 1855. The Governor neither

acknowledged nor acted on the deed, and about 30 years later the Charlotte Beach lands were sold for back taxes. The Charlotte Beach claim, then, focuses on actions taken (or not taken) by the governor and the State.[4]

Bay Mills filed two lawsuits asserting a claim to the Charlotte Beach land: a federal action against the Charlotte Beach landowners and their title companies,[5] and a claim against the State filed in the Michigan Court of Claims.[6] The cases did not differ materially on the legal theories or claims presented. In fact, the federal case is replete with claims against the State even though the state was not a party. The difference was in the relief sought: primarily return of the land in the federal suit, damages in the state suit. Two suits were needed because the State could not be sued for damages in federal court, and not because of any difference in the suits based on the facts, applicable law, or legal claims.

The federal action was dismissed on procedural grounds – the absence of the Sault Tribe from the case. That decision does not constitute an adjudication of the claims on the merits and does not by itself preclude litigation of the claims by Bay Mills. However, the same claims were involved in the state case, and in *that* case *all* of the Bay Mills claims were disposed of on the merits or on procedural grounds (primarily statute of limitations) that bar litigation in any court.

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[4] These facts are briefly stated in the 6th Circuit opinion, Exhibit C.

[5] *Bay Mills Indian Community v. Western United Life Assurance Co., et al.*, W.D. Mich. No. 2:96-CV-275. The complaint filed in the case is attached as Exhibit D.

[6] *Bay Mills Indian Community v. State of Michigan, et al.*, Mich. Ct. App. Docket No. 218580. The opinion of the appellate court is attached as Exhibit E.

Since Bay Mills lost on its claims in state court, it cannot relitigate them in federal court or any other forum under well established principles of collateral estoppel. Put simply, Bay Mills had its day in court, and does not get another one. The federal claims (primarily, that the land was not subject to taxation, and that its alienation violated the Indian Nonintercourse Act) were all lost on the merits in state court. Bay Mills had raised a number of state law claims in the federal action, but these are all what is called "pendent" claims, over which the federal court has no independent jurisdiction. They can only be litigated in federal court as ancillary to and arising out of the same circumstances as the federal claims.

These pendent state claims cannot be brought in federal court at this point, because the state courts have already decided them and there are no surviving federal causes of action to which they may be appended. The statute of limitations bars the claims in federal court because the issue was a matter of state law applied to state claims by a state court.

A federal action on the Bay Mills claims is thus no longer viable. It would be futile because collateral estoppel bars relitigation of the claims based in federal law, and the state court has already disposed of the state law claims in a way that precludes their being raised again. Bay Mills simply has no claim left. Whether lost on the merits or forever time-barred, the claims are gone.

The claim to the Charlotte Beach lands is still viable -- but only because the Sault Tribe could litigate them. Bay Mills has no claim, but we do. We were not party to

either of the Bay Mills cases and so are not bound by the results. If there is reason to settle the claim with any tribe, it is with the Sault Tribe, not Bay Mills. Through the pretense of a viable claim, Bay Mills seeks a windfall for its loss. If this bill passes, it would invite tribes who have lost claims in court, perhaps on statute of limitations grounds, to seek "settlement" of those claims in order to obtain a casino. There must be hundreds of such situations just waiting to be resurrected.

IV. The Bay Mills Case Was a Scam from the Start.

It is clear that Bay Mills filed its claim in order to obtain a casino by exploiting a loophole in the Indian Gaming Regulatory Act that allows tribes to conduct gaming on lands taken in trust after the passage of IGRA if the land is obtained in settlement of a land claim.[7] Congress would be torturing the meaning of this provision of IGRA if it allowed Bay Mills to parlay its situation into a casino on land 300 miles from its reservation to which it has no historic connection. Many of the reasons why this is so are presented in the statement of George Bennett from the Grand Traverse Band and will not be repeated by me. However, we want the Committee to know that the Bay Mills claim was clearly filed *because of* the IGRA loophole.

The Charlotte Beach claim did not originate with Bay Mills. It was the product of a Detroit area attorney who developed it specifically as a vehicle to obtain an IGRA casino. This attorney approached the Sault Tribe first with the claim, but we turned him

[7] 25 U.S.C. §2719(b)(1)(B)(i.).

down. He then took the claim to Bay Mills, who joined him up on his scheme. This attorney, Robert Golden, then represented Bay Mills in both court cases. The goal never was to recover the Charlotte Beach lands.

From its inception, the federal case had the air of a collusive suit. The federal complaint was filed on October 18, 1996. On October 10, 1996 – barely a week before suit was filed – one James F. Hadley purchased land within the Charlotte Beach claim area.[8] A few months later, on March 19, 1997, Hadley, representing himself, entered into a settlement agreement with Bay Mills.[9] Mr. Hadley just happened to own some land in Auburn Hills, a Detroit suburb, that he was willing to give Bay Mills in return for clearing his title to the Charlotte Beach lands, and he was also willing to sell Bay Mills land adjacent to that Auburn Hills parcel. The settlement was conditioned upon the Secretary of the Interior taking the Auburn Hills land into trust. The district court entered a consent judgement incorporating the settlement terms on March 28, 1997.

The goal was, of course, a suburban Detroit casino. Bay Mills soon filed an application to have the Auburn Hills land taken into trust for gaming purposes.[10] The application languished in the Interior Department, which later decided that the IGRA loophole for a land claim settlement required ratification of the settlement by Congress. When it became apparent that the trust approval was not forthcoming, Bay Mills moved

[8] The deed conveying this land is attached as Exhibit G.
[9] The Settlement Agreement is attached as Exhibit H.
[10] The first page of the trust application is attached as Exhibit I.

on to pursue a different casino site, and the consent judgment with Hadley was set aside on August 16, 1999.

Despite mounting opposition to the lawsuit by the Charlotte Beach landowners, Bay Mills tried to obtain other settlement agreements that would result in a casino. They focused on land in the small community of Vanderbilt, Michigan and developed several settlement proposals ofr obtaining the land. These proposals generally provided for the creation of a settlement fund with which the tribe would purchase a casino site. The final such proposal was circulated at the end of 1998.

Most landowners firmly opposed settlement, and they moved to dismiss the federal case because the Sault Tribe was not a party. In order to defend against this motion, Bay Mills attempted to show that the Sault Tribe was not properly recognized as a tribe and so had no rights in the property.[11] Thus Bay Mills tried to prove that we were not a tribe in order to pursue its casino.

The district court dismissed the federal case on December 11, 1998. As we showed earlier, the 6th Circuit affirmed this decision. Bay Mills later lost the state case in the Michigan Court of Claims, lost on appeal in the Michigan Court of Appeals on April 23, 2001, and was denied review by the Supreme Court on March 18, 2002.[12]

Long before the Supreme Court delivered the final blow, Bay Mills had switched from the courts to Congress in search of its casino. The site has changed – first Auburn

[11] See 6th Circuit opinion, Exhibit A, attached. The validity of Sault Tribe organization under federal law was upheld in City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157 (D. D.C. 1980).
[12] Bay Mills Indian Community v. Michigan, 122 S.Ct. 1303 (2002) (mem.)

Hills, then Vanderbilt, now Port Huron – but the goal has always been the same. Bay Mills ginned up a claim, entered into a suspicious settlement with a person who bought into the claim as a defendant eight days before suit was filed, attacked our tribe's very existence, and now seeks to put one over on Congress, all in pursuit of its goal. This is hardly a track record that Congress should reward.

V. Bay Mills is Apparently Fronting for Non-Indian Interests.

At this point, one could well be wondering why this bill is before Congress, given the points we have raised. Why is the state willing to settle the claim it had won? Why have the landowners been excluded from the process? How is it that two tribes share the claim, but that only one tribe -- and the losing tribe, at that – is included in the bill? The answer is simple: Bay Mills is apparently fronting for a group of non-Indian movers and shakers who have carried Bay Mills along on their casino quest.

The Sault Tribe, on the other hand, is fronting for no one. We have five tribally owned and operated casinos on our Indian land in the eastern Upper Peninsula, and we have <u>never</u> had outside management involved in them in any way. We also own and operate one of the three state-licensed casinos in Detroit, and are proud of the fact that we are the first and so far only tribe to hold a state license for a metropolitan casino, completely unrelated to our tribal status or IGRA. We manage that casino without outside management as well.

It is the shame of current federal Indian policymaking that powerful non-Indian gaming interests, or those who want to become involved in gaming, have latched on to tribes who have proven all too willing to lend themselves out to such interests. Bay Mills is just one of many examples around the country. Non-Indian money and influence has led to a steady expansion of IGRA casinos and an explosion of IGRA loopholes through which those of wealth and power pass, Indian tribes in tow.

We've watched the trend in outside management grow in Michigan. Michigan has five tribes that have obtained federal recognition since IGRA was passed, and all five have outside management. Of the seven tribes in Michigan prior to IGRA's passage, <u>not one</u> has outside management – Bay Mills will become the first if this bill passes. There is a surge of groups seeking federal recognition as tribes in Michigan, and all have deals with outside interests. In fact, it seems that they are seeking federal recognition at the instigation of those outside interests.

Federal Indian policy has been hijacked by these interests, who are increasingly to be found behind every tribal recognition effort, every "settlement" of a land claim, every "restoration" of tribal lands. This distorts Indian policy in favor of these interests and weakens the voice of those tribes who have not been enlisted to front for such interests. The non-Indian gamers trod a familiar path in Indian affairs. Before them others used Indian tribes for their own purposes: there were the coal, oil, and gas interests; before that, land speculators; before that, the fur traders.

IGRA increasingly stands less and less for tribal opportunity and more and more for opportunism. It should be our goal to stem this tide, not assist it in rising.

VI. The Settlement Agreement May be Legally Flawed.

In addition to all of the problems set forth above, there are a number of legal problems with the bill. The bill will likely be the subject of a legal challenge if passed, by us and by others as well. Some of these problems are highlighted in the statement of George Bennett on behalf of the Grand Traverse Band. I want to address only two of our legal objections here.

Our first objection is that this bill appears to divest our tribe, and the five other tribes who signed gaming compacts simultaneously with us and Bay Mills, from rights secured by the compacts.[13] Section 9 of the compact of each of the tribes provides:

> An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

Since the bill and the settlement agreement it ratifies are specifically based on a provision of 25 U.S.C. §2719 that deals with settlement of a land claim, the taking of the Port Huron lands into trust for gaming purposes appears to fall under Section 9 of the compact. Yet the Governor and Bay Mills have "agreed" that Section 9 does not apply to

[13] Besides Sault Tribe and Bay Mills, these tribes are the Hannahville Indian Community, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Keweenaw Bay Indian Community, and Saginaw Chippewa Tribe of Michigan.

the Port Huron lands.[14] This is a blatant attempt to deprive the Sault Tribe and the other compacting tribes of their right to share in the casino revenues under Section 9. The provision is in each of the compacts, and each tribe appears to be a third party beneficiary of the provision in every other tribe's compact. Bay Mills and the Governor cannot wish or waive this contract right away.

It happens that the seven tribes have actually entered into an agreement on revenue sharing that implements Section 9. That Inter-Tribal Agreement, signed by all tribes on May 25, 1994, is attached as Exhibit I. Under the agreement, the Sault Tribe would be entitled to 21% of the net gaming revenues from a Bay Mills casino in Port Huron if that casino falls within Section 9.

This is the only revenue sharing agreement among the tribes. If it does not apply to Port Huron, then it may be that the land cannot be taken into trust for gaming purposes because that action would violate the compact, and hence IGRA. If Congress purports to extinguish rights that are secured by Section 9, that would be an illegal taking or an impairment of our contract rights.

The settlement agreement also purports to make a number of changes that implicate the tribal-state compact. Its provisions effectively double the length of the compact term and change the financial obligations of Bay Mills, all without any legislative approval. The compacts were originally approved by the Michigan

[14] See Ex. ___, ¶ 5, p. 4.

Legislature, as required by Section 11(B) of the compacts. The agreement appears to circumvent the legislature in amending the compact.

Conclusion

S.B. 2986 is a very bad idea. It accomplishes nothing that it purports to do and much that should not be done. The bill does not clear anyone's title. It does not include the Sault Tribe and has no effect on our claim. It revives a claim Bay Mills has lost, rewarding shady dealings in the process. Indian policy should suffer no further distortion in favor of non-Indian interests lurking behind tribes like Bay Mills. If Congress sanctions this sham, the lines will grow long of those who will surely follow.